LEE HENG MOY

v.

CHRISTOPHER WONG WAI YEE & ORS

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
SULONG MATJERAIE JCA
RAMLY ALI JCA
[CIVIL APPEAL NO: B-02-774-2008]
2 FEBRUARY 2011

CIVIL PROCEDURE: *Contempt of court - Order of committal, application for - Procedural requirements, whether complied with - Whether there was serious breach of O. 52 r. 3(2) Rules of the High Court 1980 - Whether there was substantial miscarriage of justice*

The appellant, on 2 October 2007, obtained leave from the High Court through an application in encl. 49 under O. 52 r. 2 of the Rules of the High Court 1980 ('RHC') to commit one Christopher Wong Wai Yee and one Ng Cheng Keat as partners of the firm known as Tetuan Wong & Associates, a firm of advocates and solicitors. The appellant sought by way of an application in encl. 54 *via* a notice of motion to commit the two practicing advocates and solicitors, for contempt and that they be imprisoned or fined or both. The respondents raised a preliminary objection that since the notice of motion in encl. 54 was dated and filed on 23 October 2007 and it was heard on 19 March 2008, there was a breach of O. 52 r. 3(2) of the RHC which stipulates that unless within 14 days after leave was granted the motion in encl. 54 was entered for hearing, then the leave that was obtained shall lapse. The High Court Judge agreed with the preliminary objection advanced by the respondents and dismissed encl. 54. Aggrieved, the appellant appealed.

Held (dismissing the appellant's appeal; affirming decision of High Court)
Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) Leave of court to issue committal proceedings against any person must be obtained and there must be strict compliance with O. 52 r. 2(2) of the RHC. Herein, leave was obtained on 2 October 2007. The notice of motion was dated and filed

on 23 October 2007. There was already a delay of 21 days. The notice of motion was heard on 19 March 2008. A further delay of 5 months 17 days occurred. To aggravate the matter further, there was no application for an extension of time filed by the appellant at all. (paras 13 & 17)

(2) Expediency is the order of the day. Order 52 r. 3(2) of the RHC talks about lapsing of the leave if the notice of motion is not set for hearing within 14 days after the leave was obtained. It uses the phrase 'shall lapse'. The usage of the word 'shall' admits of no discretion. It means that it is mandatory. (para 19)

(3) The appellant had seriously breached O. 52 r. 3(2) of the RHC and the respondents were prejudiced by such breach bearing in mind that in a contempt proceeding the liberty of the individual was at stake. When the liberty of an individual is at stake in the context of an application for committal, a delay of even one day is fatal. (para 22)

(4) Non-compliance with the rules had occasioned a substantial miscarriage of justice as envisaged in O. 2 r. 3 of the RHC. It was also not curable under the provisions of O. 1A and O. 2 r. 1 of the RHC. Order 92 r. 4 of the RHC also could not be used indiscriminately nor applied as a matter of course to assist the appellant. It must be borne in mind that this was a contempt motion and strict adherence to the rules must be observed. (para 26)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, pada 2 Oktober 2007, memperolehi kebenaran dari Mahkamah Tinggi melalui permohonan lampiran 49 di bawah A. 52 k. 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk mengkomitkan satu Christopher Wong Wai Yee dan satu Ng Cheng Keat sebagai pekongsi sebuah firma yang dikenali sebagai Tetuan Wong & Associates, sebuah firma peguambela dan peguamcara. Perayu memohon melalui satu permohonan di dalam lampiran 54 melalui notis usul untuk mengkomitkan kedua-dua peguambela dan peguamcara, untuk penghinaan mahkamah dan untuk kedua-dua mereka dipenjarakan atau didenda atau kedua-duanya sekali. Responden-responden membangkitkan bantahan awal bahawa oleh kerana notis usul dalam lampiran 54 bertarikh

dan difailkan pada 23 Oktober 2007 dan dibicarakan pada 19 Mac 2008, terdapat pelanggaran A. 52 k. 3(2) KMT yang telah menetapkan bahawa melainkan dalam 14 hari selepas kebenaran diberikan usul dalam lampiran 54 dimasukkan untuk perbicaraan, kebenaran yang telah diperolehi akan luput. Mahkamah Tinggi bersetuju dengan bantahan awal yang dikemukakan oleh responden-responden dan menolak lampiran 54. Tidak puashati, perayu membuat rayuan ini.

Diputuskan (menolak rayuan perayu; mengesahkan keputusan Mahkamah Tinggi)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Kebenaran mahkamah untuk memulakan prosiding komital terhadap sesiapa pun mesti diperolehi dan mesti mematuhi dengan ketat A. 52 k. 2(2) KMT. Di sini, kebenaran diperolehi pada 2 Oktober 2007. Notis usul bertarikh dan difailkan pada 23 Oktober 2007. Terdapat kelengahan 21 hari. Notis usul dibicarakan pada 19 Mac 2008. Terdapat selanjutnya kelengahan 5 bulan 17 hari. Untuk memburukkan lagi keadaan, tidak terdapat permohonan penangguhan masa yang difailkan oleh perayu langsung.

(2) Kesesuaian adalah amalan harian. Arahan 52 k. 3(2) KMT bercakap tentang keluputan kebenaran jika notis usul tidak ditetapkan untuk perbicaraan dalam masa 14 hari selepas kebenaran diperolehi. Ia menggunakan frasa 'shall lapse'. Penggunaan perkataan 'shall' menunjukkan tiada budibicara. Ia bermakna ia adalah mandatori.

(3) Perayu telah secara serius melanggar A. 52 k. 3(2) KMT dan responden-responden diprejudis dengan pelanggaran tersebut kerana perlu diingati bahawa di dalam prosiding komital kebebasan seseorang individu dipertikaikan. Apabila kebebasan seseorang individu dipertikaikan di dalam konteks permohonan komital, kelewatan walaupun satu hari adalah memudaratkan.

(4) Ketidakpatuhan dengan kaedah-kaedah telah menyebabkan salah laksana keadilan yang substantial seperti yang dibayangkan di dalam A. 2 k. 3 KMT. Ia juga tidak boleh diubati di bawah peruntukan-peruntukan A. 1A dan A. 2 k. 1

A KMT. Arahan 92 k. 4 KMT juga tidak boleh digunakan secara sembarangan atau digunapakai sebagai hal biasa untuk membantu perayu. Ia harus diingati bahawa ini adalah usul penghinaan dan pematuhan ketat kepada kaedah-kaedah mesti diperhatikan.

B **Case(s) referred to:**

Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru [1995] 4 CLJ 339 HC ***(refd)***

Arthur Lee Meng Kwang v. Faber Merlin (M) Bhd & Ors [1986] 2 CLJ 109; [1986] CLJ (Rep) 58 SC ***(refd)***

C *Con-Mech Ltd v. Amalgamated Union of Engineering Workers [1973] ICR 620* ***(refd)***

Duport Steels Ltd and others v. Sirs and Others [1980] 1 All ER 529 ***(refd)***

Helen Yeap Poh Sim & Yang Lain lwn. Universal Trustee (Malaysia) Bhd [2001] 7 CLJ 414 HC ***(refd)***

D *In re Bramblevale Ltd [1970] 1 Ch 128* ***(refd)***

Kesatuan Pekerja-Pekerja Perusahaan Dunlop Malaysia v. Md Jaafar Abdul Carrim & Anor [1998] 1 CLJ Supp 454 HC ***(refd)***

Knight And Another v. Clifton And Others [1971] Ch 700 ***(refd)***

Lembaga Tabung Haji v. Metrowangsa Asset Management Sdn Bhd & Anor [2002] 4 CLJ 561 HC ***(refd)***

E *Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Ors [2003] 8 CLJ 265 HC* ***(refd)***

PA Thomas & Co And Others v. Mould And Others [1968] 2 QB 913 ***(refd)***

Sykt M Mohamed v. Mahindapal Singh Joginder Singh & Ors [1991] 1 CLJ 582; [1991] 4 CLJ (Rep) 16 HC ***(refd)***

F *The King v. The Council of the Metropolitan Borough of Poplar, Ex parte The London County Council, Same v. Same, Ex parte The Managers of the Metropolitan Asylum District (No 2) [1922] 1 KB 95* ***(refd)***

The Queen v. Forbes And Another, Ex Parte Bevan And Others, The Queen v. Drinkwater And Another, Ex Parte Heffernan And Others [1972] 127 CLR 1 ***(refd)***

G *The Sussex Peerage case [1844] 11 CIark & Finnelly 85* ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 1A, O. 2 rr. 1, 3, O. 52 rr. 2(2), 3(1), (2), (4), O. 92 r. 4

H *For the appellant - In person*
For the respondents - Ng Cheng Keat; M/s Wong & Assocs

[Appeal from High Court, Shah Alam; Suit No: MT1-22-164-2005]

Reported by Suhainah Wahiduddin

I

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

[1] From the bar, learned counsel by the name of Mr Ng Cheng Keat - the second respondent in this appeal, drew our attention to the demise of Mr Christopher Wong Wai Yee - the first respondent in this appeal on 8 February 2007. And since this appeal centred on the issue of contempt, Mr Ng Cheng Keat submitted that it would be appropriate to strike out the appeal against the first respondent forthwith. Without furtherado, we struck out the appeal of the appellant against the first respondent with no order as to costs.

[2] We then proceeded to hear the appeal. As a matter of record, we have this to say. We conducted the appeal judiciously by allowing the appellant ample time to submit to her heart's content. We listened attentively to her oral submissions. We anxiously considered her written submissions and the authorities submitted by her. We advised her not to submit off tangent and also the need to submit within the scope of her notice of appeal.

The facts

[3] Within a short compass, the facts may be stated as follows. On 2 October 2007, the appellant obtained through her application in encl. 49 leave from the High Court at Shah Alam under O. 52 r. 2(2) of the Rules of the High Court 1980 ("RHC") to commit Mr Christopher Wong Wai Yee and Mr Ng Cheng Keat as partners of the firm known as Tetuan Wong & Associates, a firm of advocates and solicitors, that represented defendants one, two, three, four, five and seven.

[4] The appellant then sought by way of an application in encl. 54 *via* a notice of motion to commit Mr Christopher Wong Wai Yee and Mr Ng Cheng Keat - two practising advocates and solicitors, for contempt and that they be imprisoned or fined or both.

[5] Before the learned High Court judge, the respondents raised a simple preliminary objection. It was worded in this way. That since the notice of motion in encl. 54 was dated and filed on 23 October 2007 and it was heard on 19 March 2008, there was

a breach of O. 52 r. 3(2) of the RHC which stipulates that unless within 14 days after leave is granted the motion in encl. 54 is entered for hearing then the leave that was obtained shall lapse.

[6] The learned High Court judge agreed with the preliminary objection advanced by the respondents and her Ladyship dismissed encl. 54 with costs. Aggrieved, the appellant appealed to this court.

Analysis

[7] The inherent contempt jurisdiction of the court can never be doubted. The power vested in the court to punish contempt is not derived from statute or from the common law. That power is ingrained in the court by virtue of it being a court of law. It is as simple as that.

[8] The RHC should not restrict or abrogate the contempt power inherent in the court. And the absence of a rule of procedure is not fatal to a contempt action (*Con-Mech Ltd v. Amalgamated Union of Engineering Workers* [1973] ICR 620 at 626).

[9] Menzies J said in *The Queen v. Forbes And Another, Ex Parte Bevan And Others, The Queen v. Drinkwater And Another, Ex Parte Heffernan And Others* [1972] 127 CLR 1, at p. 7, that, " 'Inherent jurisdiction' is the power which a court has simply because it is a court of a particular description. Thus the courts of common law without the aid of any authorising provision had inherent jurisdiction to prevent abuse of their process and to punish for contempt".

[10] Having established that the court has the inherent contempt jurisdiction, it is appropriate to say that a contemnor who is in contempt of court may be imprisoned or fined or both. It carries penal consequences. The liberty of the contemnor may be curtailed. In the words of O'Connor J in *PA Thomas & Co And Others v. Mould And Others* [1968] 2 QB 913, at 923, [1968] 1 All ER 963, at 967:

> ... where parties seek to invoke the power of the court to commit people to prison and deprive them of their liberty, there has got to be quite clear certainty about it.

[11] By virtue of encl. 54, the appellant wants to commit two practising advocates and solicitors for contempt by incarcerating them in prison or fining them or both. It is not an application that can be taken lightly. In the words of Lord Denning MR in *In re Bramblevale Ltd* [1970] 1 Ch 128 at 137:

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond all reasonable doubt.

[12] It is our judgment that the procedural rules governing committal proceedings must be strictly adhered to. This brings to the forefront O. 52 r. 2 of the RHC. It reads as follows:

> 2. Application to court (O. 52 r. 2)
>
> (1) No application to a Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.
>
> (2) An application for such leave must be made *ex parte* to the Court, except in vacation when it may be made to a Judge in Chambers, and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

[13] Thus, leave of court to issue committal proceedings against any person must be obtained. And the application must be made *ex parte* and a supporting statement together with the affidavit verifying the facts relied upon must be filed. It is imperative that the supporting statement should set out the name and description of the applicant as well as the name, description and address of the person sought to be committed together with the grounds thereto. There must be strict compliance with O. 52 r. 2(2) of the RHC (*Kesatuan Pekerja-Pekerja Perusahaan Dunlop Malaysia v. Md Jaafar Abdul Carrim & Anor* [1998] 1 CLJ Supp 454; *Arthur Lee Meng Kwang v. Faber Merlin (M) Bhd & Ors* [1986] 2 CLJ 109; [1986] CLJ (Rep) 58, SC; *Sykt M Mohamed v. Mahindapal Singh Joginder Singh & Ors* [1991] 1 CLJ 582; [1991] 4 CLJ (Rep) 16; *Helen Yeap Poh Sim & Yang Lain lwn. Universal Trustee (Malaysia) Bhd* [2001] 7 CLJ 414; and *Lembaga Tabung Haji v. Metrowangsa Asset Management Sdn Bhd & Anor* [2002] 4 CLJ 561).

[14] Here, leave was obtained by the appellant. But, learned counsel for the respondents argued that the leave that was granted by the High Court at Shah Alam had lapsed because encl. 54 was entered for hearing late in the day. It is now ideal to refer to O. 52 r. 3 of the RHC. It reads as follows:

> 3. Application for order after leave to apply granted (O. 52 r. 3)
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> (1) When leave has been granted under rule 2 to apply for an order of committal, the application for the order must be made by motion to the Court and, unless the Court or Judge granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing.
>
> (2) Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse.
>
> (3) Subject to paragraph (4), the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 2, must be served personally on the person sought to be committed.
>
> (4) Without prejudice to the powers of the Court or Judge under Order 62 rule 5, the Court or Judge may dispense with service of the notice of motion under this rule if it or he thinks it just to do so.

[15] Since leave was obtained by the appellant pursuant to O. 52 r. 2 of the RHC, encl. 54 should have been entered for hearing on 16 October 2007 and not on 19 March 2008 so that it would strictly comply with O. 52 r. 3(2) of the RHC. It is ideal to recall to mind the case of *Syarikat M Mohamed v. Mahindapal Singh & Ors (supra)* where KC Vohrah J (later JCA) aptly said at p. 20:

> ... that since committal proceedings are quasi-criminal proceedings and the liberty of the subject is involved, the procedural rules applicable must be strictly enforced.

[16] Now, after leave has been obtained pursuant to O. 52 r. 2 of the RHC, the applicant must expeditiously file the notice of motion together with the statement and affidavit and serve them on the person sought to be committed. According to O. 52 r. 3(1) of the RHC there must be at least eight clear days between the service of the notice of motion and the day named therein for the hearing. And within a span of 14 days after the leave was granted, the applicant must make sure that the motion is entered for hearing otherwise the leave that was obtained shall lapse.

[17] Here, leave was obtained on 2 October 2007. The notice of motion was dated and filed on 23 October 2007. There was already a delay of 21 days. And the notice of motion was heard on 19 March 2008. A further delay of five months 17 days occurred (calculated from 2 October 2007 to 19 March 2008). To aggravate the matter further there was no application for an extension of time filed by the appellant at all. Even the learned High Court judge did not resort to invoke O. 52 r. 3(4) of the RHC to assist the appellant and we saw no reason to disagree with her Ladyship.

[18] It must be emphasised that the notice of motion is a very important legal document after the leave was obtained. That notice of motion accompanied by the statement must set out the name, description and address of the person to be committed and the grounds on which his committal is being sought. It must also be accompanied by an affidavit. Together the notice of motion, the statement and the affidavit must be served personally on the person that is sought to be committed. There must be personal service (*The King v. The Council of the Metropolitan Borough of Poplar, Ex parte The London County Council, Same v. Same, Ex parte The Managers of the Metropolitan Asylum District (No 2)* [1922] 1 KB 95, CA). With the death of Mr Christopher Wong Wai Yee, the appeal against him was struck out because the alleged contemnor had died.

[19] Expediency is the order of the day. Order 52 r. 3(2) of the RHC talks about lapsing of the leave if the notice of motion is not set for hearing within 14 days after the leave was obtained. It uses the phrase "shall lapse". The usage of the word "shall" admits of no discretion. It means that it is mandatory. Tindal CJ in the *The Sussex Peerage case* [1844] 11 CIark & Finnelly 85 at 143 said:

> If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense.

[20] Lord Scarman in *Duport Steels Ltd and others v. Sirs and Others* [1980] 1 All ER 529 at 551 said that:

> ... the judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires.

[21] We will apply the law as set out in O. 52 r. 3(2) of the RHC no matter how "unpalatable" that may be (to borrow the speech of Lord Scarman in *Duport Steels Ltd and others v. Sirs and Others (supra)*). And when so applied, it will be held to the disadvantage of the appellant.

[22] It is our judgment that the appellant has seriously breached O. 52 r. 3(2) of the RHC and the respondents were prejudiced by such breach bearing in mind that in a contempt proceeding the liberty of the individual is at stake. The argument that the appellant merely delayed for eight days cannot be accepted and must be rejected forthwith. When the liberty of an individual is at stake in the context of an application for committal, a delay of even one day is fatal.

[23] The memorandum of appeal averred that the learned High Court judge erred in law and in fact when her Ladyship failed to consider and apply O. 1A of the RHC in favour of the appellant. That O. 1A of the RHC is worded in this way:

> Order 1A
>
> Court Or Judge Shall Have Regard To Justice
>
> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

[24] We are of the view that O. 1A of the RHC cannot be applied to all cases. In the context of the present case, the facts must surely be the guiding force in determining the applicability of O. 1A of the RHC. We have set out the rigours of the contempt law. A contemnor's liberty would be a crucial factor that demands a rigid adherence to the rules. We are not so besotted by the rules and our sense of justice and fairness are not compromised. Since the appellant wants to commit the two advocates and solicitors, she must strictly comply with O. 52 r. 3(2) of the RHC. There are no two ways about it.

[25] Russell LJ in *Knight And Another v. Clifton And Others* [1971] Ch 700, CA, at 707, [1971] 2 All ER 378, CA, at 381 aptly said that:

> Contempt of court, even of the type that consists in breach of an injunction or undertaking, is something that may carry penal consequences, even loss of liberty, and the evidence required to establish it must be appropriately cogent.

[26] The justice of the case demands that we construe O. 52 r. 3(2) of the RHC strictly. It is our judgment that the non-compliance with the rules has occasioned a substantial miscarriage of justice as envisaged in O. 2 r. 3 of the RHC. And it is also not curable under the provisions of O. 1A and O. 2 r. 1 of the RHC. Even O. 92 r. 4 of the RHC cannot be used indiscriminately nor applied as a matter of course (*Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 4 CLJ 339; and *Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Ors* [2003] 8 CLJ 265) to assist the appellant. It must be borne in mind that we are dealing with a contempt motion and strict adherence to the rules must be observed.

[27] For these varied reasons, we unanimously dismissed the appellant's appeal with costs of RM10,000. We affirmed the decision of the learned High Court judge. Deposit should rightly go to the respondents as part of the costs.